



Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

2011

Three Recent Works on Contractual Interpretation [Part 1]

John D. McCamus

Osgoode Hall Law School of York University, jmccamus@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Contracts Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

McCamus, John D. "Three Recent Works on Contractual Interpretation [Part 1]." *Canadian Business Law Journal* 52.1 (2011): 136-153.

This Review Essay is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

REVIEW ESSAYS AND BOOK REVIEWS

Three Recent Works on Contractual Interpretation: Steven J. Burton, *Elements of Contractual Interpretation*; Geoff R. Hall, *Canadian Contractual Interpretation Law*; Catherine Mitchell, *Interpretation of Contracts: Part One*

1. Introduction

From a practical perspective, the law of contractual interpretation is an extremely important aspect of the law of contracts. For the commercial lawyer, issues of contractual interpretation constitute a mainstay of one's daily practice. It is therefore surprising that the field is quite underwritten. There are few scholarly monographs and a modest volume of secondary literature on the subject. It is not obvious why this should be the case. Statutory interpretation has attracted a comparatively vast literature.¹ One possible explanation is that the doctrine is so complex and indeed, inconsistent, that it does not yield easily to the author's pen. Further, the subject may appear a bit too dry for academic taste though, it must be said, it is not palpably less exciting than the academically more well-trodden topics of contract law. Although the major treatises on contract law do provide some coverage of the subject and in England, the profession has access to the splendid text by Lewison L.J.,² little else has been available. Accordingly, it is an unexpected pleasure to welcome the arrival of three new works on the subject. For Canadian lawyers, the publication of Geoff Hall's text, *Canadian Contractual Interpretation Law*,³ will be especially welcome. The other volumes, one by an American academic, Steven Burton,⁴ and the other by an English academic, Catherine Mitchell,⁵ also offer valuable contributions to our understanding of the subject. Part One of this review article consists of a discussion of Burton's

1. For a recent and innovative attempt to provide a comprehensive theory of interpretation covering the interpretation of statutes, contracts, wills and constitutions by former Chief Justice Barak, see A. Barak, *Purposive Interpretation in Law* (Princeton, Princeton University Press, 2005).
2. K. Lewison, *Interpretation of Contracts*, 4th ed. (London, Sweet & Maxwell, 2007).
3. G.R. Hall, *Canadian Contractual Interpretation Law* (Markham, LexisNexis Canada, 2007).
4. S.J. Burton, *Elements of Contract Interpretation* (New York, Oxford University Press, 2009).
5. C. Mitchell, *Interpretation of Contracts* (London, Routledge-Cavendish, 2007).

monograph. Part Two, which will be published in the next issue of the C.B.L.J., will turn to the works by Hall and Mitchell.

2. Steven J. Burton, *Elements of Contractual Interpretation*

The principal achievement of this new work by Professor Burton is the articulation of a lucid analytical model within which to assemble and assess various approaches to issues of contractual interpretation. As in other fields, American experience and jurisprudence is both vast and richly varied. Writing in the American context, therefore, Burton is able to examine a broad range of possible solutions to problems of contractual interpretation. Burton does not, however, simply survey the possibilities; he is a man with a mission. He is staunchly opposed to what he sees as the emerging consensus in the American law of contractual interpretation. He argues strenuously and, no doubt for some, convincingly for a return to a more conservative era and approach to the issues.

Burton's relatively short monograph is tightly structured and closely argued. He begins at the beginning, one might say, and identifies the goals of contractual interpretation. As Burton observes, "American courts universally say that the primary goal of contract interpretation is to ascertain the parties' intention at the time they made their contract."⁶ In pursuing this objective, the courts are aligned with the four principal goals of contract law. The first objective is to give effect to the "contractual freedoms," these being freedom "of" contract, *i.e.*, the freedom to create contractual relationships that give effect to the parties' desires and intentions with respect to the future and freedom "from" contract in the sense that obligations will not be imposed on parties without their consent. There are, in his view, three other important goals. First, Burton emphasizes the importance of "the security of transactions." Here, he is particularly concerned with the ability of third parties, such as assignees, to rely on their reasonable expectations as to the meaning of contractual documents. A third goal pertains to the "peaceful settlement of disputes non-arbitrarily, in accordance with the Rule of Law"⁷ and weighs in favour of consistency and predictability in the law. A fourth related goal is that of "formulating legal rules that are

6. Burton, *supra*, footnote 4, at p. 1.

7. *Ibid.*, at p. 7.

administrable by the courts and by the parties.”⁸ This goal weighs in favour of rules that “draw relatively clear lines and require objective proof.”⁹ Briefly stated, Burton’s concern with the modern consensus in American interpretation doctrine is that it privileges the contractual freedoms at the expense of the other three goals.

Burton then identifies the three “tasks” that must be undertaken as the law of contractual interpretation pursues these objectives. First, one must identify the terms that require interpretation. The principal source of controversy in performing this task is to determine whether, when interpreting a written agreement, there are collateral oral or written agreements that should be included as part of the agreement to be interpreted. This is the domain of the parol evidence rule and, as Burton emphasizes, this is its only role. I would add that, strictly speaking, the parol evidence rule is not really a component of the law of interpretation. The parol evidence rule determines the contents of a contract in circumstances where one party wishes to incorporate an alleged parol agreement into a written contract. In such a case, there may be no difficulty in interpreting the clear language of either the written document or the alleged parol agreement. The problem is whether or not to incorporate the latter into the former. Nonetheless, Burton is surely correct in suggesting that the first step along the path to proper interpretation of an agreement is to identify the contents of the agreement.

The second task is for the court to determine whether the term to be interpreted is ambiguous in the *contested* respect. A court does not determine whether or not a term is ambiguous in the abstract. The parties to the litigation will offer competing interpretations of the term. The court must then determine whether the term is ambiguous in the sense that it can plausibly be interpreted in accord with both of the two contested meanings. If the term in question may only reasonably bear one of the contending interpretations advanced by the parties, the term is not ambiguous in the contested respect and its “plain meaning” ought to be enforced. This is for Burton the proper understanding of the “plain meaning rule.” Although, as he observes,¹⁰ the plain meaning rule is shunned by many critics, properly understood, in Burton’s view, the rule is a simple tautology. That, indeed, explains

8. *Ibid.*, at p. 8.

9. *Ibid.*, at p. 8.

10. *Ibid.*, at p. xii.

its persistence. If a court determines that the provision can reasonably bear only one of the contested meanings, its plain meaning should be enforced. On Burton's view, the plain meaning rule has nothing to say with respect to the question of what evidence, either intrinsic or extrinsic to the written document, can be considered in arriving at the conclusion that the term is or is not ambiguous in the requisite sense. Once ambiguity is found, the third task arises. The court must, if possible, resolve the ambiguity. Again, the critical question is to determine what evidence is admissible and material to the task.

Having identified the three interpretive tasks, Burton then further explores the critical question in the context of each task, the determination of the resources that the court may examine in performing the particular task. The most contentious issue is to determine the extent to which a court may examine facts or resources that are extrinsic to the contractual document itself. In aid of providing an orderly analysis of the possible answers to this critical question, Burton identifies three "theories" of interpretation. For Burton, a theory of interpretation "tells an interpreter how to perform the three tasks to further the goals of contractual interpretation."¹¹ The three theories are literalism, objectivism and subjectivism. The three theories differ on the facts or resources — the "elements" of the book's title — that may be taken into account by a court in performing each of the three tasks. For purposes of analysis, it is not necessary that any or many people in the real world are actually strict or consistent adherents of any of the three theories. Indeed, it may be that Burton's literalists and subjectivists (at least his "strong" subjectivists) are, to some degree, caricatures. Nonetheless, these three theories do serve well the author's objective of outlining various possible views as to the elements that ought to be taken into account in performing each of the three interpretive tasks.

"Literalism allows an interpreter to take into account only the words of contracts and the dictionary." The literalist maintains that words can have an objective or one true meaning apart from the context in which they are used.¹² Literalism is not to be taken seriously. The idea that one can interpret an agreement with the agreement in one hand and a dictionary in the other defies common sense. Literalism is not followed by the American

11. *Ibid.*, at p. 2.

12. *Ibid.*, at p. 21.

courts,¹³ though Burton asserts that commercial arbitrators often adopt a literalist approach. He also accuses some law and economic scholars of essentially adopting such a view.¹⁴ Burton quotes Learned Hand for the proposition that “[t]here is no surer way to misread any document than to read it literally.”¹⁵ In Burton’s view, some context is simply indispensable in determining the meaning of language. Literalists themselves, he claims, cannot avoid considering the context in which the disputed term is used in order to choose from amongst dictionary definitions of the term. A literalist must surely consider the context of the sentence or phrase in which the word appears and the rules of grammar. More than this, “[i]t seems probable that an interpreter, supposing herself to be a literalist, implicitly and perhaps unconsciously but inevitably, uses more context than just a sentence or phrase.”¹⁶ Thus, a significant deficiency in the literalist approach is that the literalist fails to openly identify the contractual elements actually employed in interpreting the term in question.

The objectivist would consider a significantly broader range of interpretive elements in performing the three tasks. In addition to the disputed term, the dictionary and the rules of grammar, an objectivist would examine “the contract as a whole, the objective circumstances at formation, the document’s purpose(s), ordinary meanings, trade usages and customs, legal precedents and any practical construction.”¹⁷ Readers familiar with the Anglo-Canadian law of contractual interpretation will have little difficulty in understanding the general nature of the various items on that list. The “objective circumstances at formation” roughly approximate what is referred to in English and Canadian law as the “factual matrix” or commercial setting of the agreement. The term “practical construction” refers to a course of performance of the agreement in which one party knowingly and willingly engages in repeated conduct over a considerable period of time which the other party accepts or acquiesces in as acceptable performance of the agreement.¹⁸ Arguably, such conduct is an objective manifestation of how the parties themselves interpret the contractual language concerning the obligation in question.

13. *Ibid.*, at p. 18.

14. *Ibid.*, at pp. 36-37, attributing such views to Alan Schwartz and Robert E. Scott.

15. *Ibid.*, at p. 19, citing *Guisseppi v. Walling*, 324 U.S. 244, 65 S.Ct. 605 (1944), at p. 624.

16. Burton, *supra*, footnote 4, at p. 39.

17. *Ibid.*, at p. 41.

18. *Ibid.*, at p. 50.

The elements considered by a subjectivist in performing the three tasks include the foregoing list and add three subjectivist elements, *i.e.*, a “prior course of dealing,” the “course of negotiations” and a party’s testimony as to its intentions. These elements are subjectivist, for Burton, in the sense that they “take into account circumstances bearing only upon the parties’ subjective intentions.”¹⁹ The distinction between objectivist and subjectivist elements is not watertight. In particular, the distinction between “practical construction” as objectivist and prior course of dealing as subjectivist is difficult to sustain. Burton explains that practical construction “is objective because it is based on conduct . . . that indicates how the parties used ambiguous language on the point in question.”²⁰ One might say, however, that it is evidence of what the parties *subjectively* understood to be the meaning of the ambiguous language. Further, prior course of dealing is objective in the sense that it is based on observable conduct and similarly, it too might be considered to be a basis upon which to infer what the parties understood subjectively with respect to the matter in question when they negotiated their most recent contract. Thus, Burton’s sharp break between prior course of conduct as subjectivist and practical construction as objectivist is difficult to defend. Nonetheless, the distinction between objectivist and subjectivist elements is workable in a general way. The objectivist rejects evidence of prior course of dealing, the course of negotiations or a party’s evidence as to its own past intentions. The subjectivist would consider such evidence to be material and admissible.

Burton briefly mentions the traditional canons of interpretation. They are not “elements” in the sense in which he uses the term. They are, in his view, rather “guides to interpretation,”²¹ many of which come into play when the interpreter examines the document as a whole. The presumptions in favour of a harmonious whole, against mere surplusage, in favour of specific terms over more general provisions in the event of conflict and the other familiar Latin phrases will enable the interpreter to make sense of the interaction of various components of the whole agreement. Other canons, such as the preference in favour of legality, reflect principles of public policy to be applied in the event of ambiguity. The canons are not of particular relevance to

19. *Ibid.*, at p. 56.

20. *Ibid.*, at p. 51.

21. *Ibid.*, at p. 59.

Burton's thesis which is preoccupied with determining when and whether the various "elements" he identifies should be considered admissible and material in the performance of the three tasks.

Burton's account of the four goals of interpretation, the three interpretive tasks the interpreter, the three theories and the lengthy list of elements sets the table for the main analytical work of the book. In chapters 3 to 5 Burton provides a sustained analysis of each of the three tasks. In each case, he describes how each of the three theories would approach the task and, more particularly, which of the elements would be considered relevant to their performance. Arguments for and against the various positions are often advanced.

Chapter 3, "Identifying the Terms," is preoccupied with analysis of the parol evidence rule. Identification of the terms of the contract becomes problematic in circumstances where there exists a written agreement and one party alleges that their agreement also includes certain collateral understandings. This is the problem and, again, the only problem that the parol evidence rule is designed to solve. Burton provides a detailed analysis of the rule and its various exceptions. He states the rule thusly:

When an enforceable, written agreement is the final and the complete expression of the parties' agreement, prior oral and written agreements and contemporaneous oral agreements (together "parol agreements") concerning the same subject as the writing do not establish contract terms when the parol agreement contradicts or adds to the terms of the writing.²²

The principal purpose of the rule is the implementation of "the parties' intention by giving the writing the effect they intended it to have."²³ The critical question then becomes, what evidence is considered relevant and material to the determination of whether the parties had such an intention.

A literalist would take the view that the parties' intent on this point is best reflected in the document itself. On this view, the presence or absence of a merger clause is critical. Some courts take the view that a clear merger clause raises a conclusive presumption of integration. In theory, neither the context nor the document as a whole is relevant to the enquiry. Burton asserts, however, that literalism on this point can lead to error. The parties with prior

22. *Ibid.*, at p. 64. Burton further notes that a second part of the rule provides for the situation in which the integration of the written agreement is merely partial. In such circumstances, the parol agreement may add to but not contradict the "partially integrated agreement." *Ibid.*, at pp. 64-65.

23. *Ibid.*, at p. 69.

binding agreements may not intend to supersede them notwithstanding the presence of such a clause. Moreover, such clauses may be ambiguous. Literalism offers no solution to this problem.

Some American courts follow an objectivist approach and attempt to determine the existence of an intention to integrate on the basis of the whole written contract as interpreted by a reasonable person, together with any allegation of an alleged parol agreement. Such courts rarely consider factors such as relative bargaining strength or the presence of counsel. They attempt to determine whether the written agreement would “naturally”²⁴ have included the alleged collateral agreement if the parties considered it binding. A merger clause would raise a rebuttable presumption of integration. Burton reports, however, that most American courts follow a subjectivist approach and will examine all elements relevant to determining the presence of an intention to integrate including evidence of negotiations, party statements as to their intent and any other material evidence. A merger clause would be merely some evidence of the existence of such an intention. As we will see, Burton does not agree with the majority American rule.

In chapter 4, “The Ambiguity Question,” Burton turns to the second task, the determination of whether the contractual provision at issue is ambiguous in the contested respect. Most jurisdictions, he reports, consider this to be the domain of the “plain meaning rule.”²⁵ In Burton’s view, however, the purport of the plain meaning rule is often not clearly appreciated. Properly understood, the plain meaning rule simply asserts the tautology that if the agreement is unambiguous, its unambiguous meaning ought to be enforced. The plain meaning rule itself says nothing on the critical question of what evidence can be looked at to determine whether an ambiguity is present. The jurisprudence distinguishes between two different types of ambiguities. “Intrinsic” or “patent” ambiguity appears from the very face of the document itself or, as is often said, “within its four corners.” “Extrinsic” or “latent” ambiguity becomes apparent only when one examines evidence extrinsic to the writing. The face of the document may appear to be perfectly unambiguous. Extrinsic evidence may show, however, that there exists a trade usage or that for some other reason the parties may have attributed a meaning to the particular provision that is not apparent from the face of the document itself. Most

24. *Ibid.*, at p. 81.

25. *Ibid.*, at p. 105.

American courts recognize intrinsic but not extrinsic ambiguities. On this view, extrinsic evidence is inadmissible for task 2. Some courts recognize both. Courts that refuse to recognize extrinsic ambiguities often state that they are applying the “four corners rule.” The four corners rule thus differs from the plain meaning rule when both are properly understood. It is the four corners rule that restricts a finding of ambiguity to those which appear on the face of the document. The plain meaning rule, on the other hand, is applicable to both intrinsic and extrinsic ambiguities. If the court is not persuaded that the agreement is either intrinsically or extrinsically ambiguous, the plain meaning of the agreement will be enforced.

The four corners rule is severely criticized by academics and by judges that recognize extrinsic ambiguity. Burton aligns himself with this criticism. The four corners rule is essentially a literalist approach. Those who reject the four corners rule and hold that ambiguity should be determined only after reviewing relevant extrinsic evidence differ, however, on how much extrinsic evidence should be considered admissible. An objective theorist would consider not only the face of the document but the parties’ allegations, arguments, affidavits and proffers of extrinsic evidence of the objective context of the agreement before deciding whether or not a provision is ambiguous but would not admit extrinsic evidence concerning the course of negotiations or party testimony about their own subjective intentions.²⁶ A subjective theorist would admit the latter as well.

Burton describes a fourth position that may be taken with respect to the question of ambiguity. In addition, to the above three positions — literalist, objectivist and subjectivist — Burton indicates that there are a number of authorities that take a fourth view that no finding of ambiguity should be required in order to introduce extrinsic evidence of various kinds for interpretive purposes. Although this position is supported by leading contract scholars and by the *Restatement Second of Contracts*²⁷ and the *Uniform Commercial Code*,²⁸ Burton is opposed.

This fourth position might be explained, however, on the basis that, where courts are of the view that all the elements that are admissible and material with respect to the question of ambiguity

26. *Ibid.*, at p. 114.

27. American Law Institute, *Restatement of the Law, Second, Contracts* (St. Paul, American Law Institute Publishers, 1981). Section 212, as interpreted by Burton, *supra*, footnote 4, at pp. 139-140.

28. UCC § 2-202(a), as interpreted by Burton, *supra*, footnote 4, at pp. 140-143.

are also admissible and material with respect to its resolution, they would not need to distinguish between contracts which are ambiguous in some requisite sense and those that are not. A requirement of a threshold finding of ambiguity would only be relevant if such a finding made certain additional extrinsic materials admissible and relevant to the interpretive task. Thus, in a jurisdiction that admitted all of Burton's objective elements for the purposes of task 2 and, as well, for the purposes of task 3, there would be no need to engage in a preliminary and threshold exercise of asking whether the agreement is ambiguous. The objectivist elements will be admitted and considered. If the court concludes on the basis of such elements that the provision is not ambiguous, the plain meaning will be enforced. If there are two plausible meanings, however, the court will attempt to choose one on the basis of the objectivist elements. Similarly, if a court held that subjectivist elements were material both to the task of finding ambiguity and to its resolution, the court would again not find it necessary to make an explicit finding of ambiguity in order to render certain materials admissible. In short, the explanation for some courts not taking a threshold step of identifying ambiguity may simply be that they consider the same list of elements admissible and relevant for both tasks 2 and 3.

Against this background, there is, perhaps, a fifth position ignored by Burton. One might consider that certain objectivist extrinsic elements are relevant both for the task of finding ambiguity and the task of resolving it but that certain elements (presumably those of a highly subjective nature) would be admissible and relevant only if a threshold finding of ambiguity has been made. Such a court, when looking at merely objectivist elements, would find no need to identify an ambiguity as a threshold test for admitting objectivist elements. An ambiguity threshold would be articulated only if such a court wished to examine the subjectivist elements whose very admissibility turns on a threshold finding of ambiguity. As we shall see, this may indeed be the position under English and Canadian law. I rather suspect it may be the approach taken in a number of American jurisdictions, as well.

In chapter 5, "Resolving Ambiguities," Burton turns to the task of resolving ambiguity. Burton begins by conceding, reluctantly, "that the subjective theory dominates the law here."²⁹ After examining the respective roles of judge and jury in resolving

29. *Supra*, footnote 4, at p. 151.

ambiguities under American law, Burton then proceeds to provide several interesting illustrations of the use of various elements in resolving ambiguities in the reported cases. Of particular interest are his discussions of the subjectivist elements. Burton does not favour reliance on subjectivist elements. Evidence concerning the course of negotiations would be subjectivist for Burton. As Burton concedes, however, resort to such evidence is a "potentially persuasive way of resolving an ambiguity."³⁰ Thus, for example, deletions and substitutions of language might be revealing. In an American case,³¹ a provision in a separation agreement stipulated that the husband's obligation to support would terminate upon the wife's "co-habitation with a person in a situation analogous to marriage." At issue was whether the term "person" referred to males only or could include females. In part, on the basis of testimony to the effect that the husband had deleted the term "male" and replaced it with "person," together with other evidence of the parties' understanding of the term, the court concluded that the term person included both males and females. One party was unfairly trying to enforce a meaning of the agreement that neither party initially intended. Such cases are compelling reading for those who think that a court ought to be able to examine such extrinsic evidence in order to resolve alleged ambiguities in the agreement.

Permitting parties to testify as to their own past subjective intentions or understandings might be considered to be more controversial than allowing in evidence of the history of negotiations. Nonetheless, in light of the principal objective of giving effect to the intentions of the parties when interpreting agreements, the majority American rule is to admit such evidence in order to resolve an ambiguity. Burton provides the illustration of a controversy concerning the liability of a tenant "for all damages . . . intentional or non-intentional" under a lease.³² Such language appears literally to impose strict liability on the tenant. Nonetheless, the court admitted evidence both from the tenant and from the person who drafted the agreement on behalf of the landlord to the effect that neither party intended the tenant to be liable in the absence of negligence. Again, where the evidence of what the parties subjectively intended is clear, many would agree that the desirable outcome is to give effect to those intentions.

30. *Ibid.*, at p. 165.

31. *Stroud v. Stroud*, 641 S.E. 2d 142, 49 Va. App. 359 (2007).

32. *Supra*, footnote 4, at p. 173.

The third subjectivist element identified by Burton is the parties' prior "course of dealing." On this point, Burton does not provide particularly useful illustrations of cases in which courts hold that a prior course of dealing indicates what the parties must have intended by the particular language they used. (His main point is that such evidence is subjectivist because it is aimed at identifying what the subjective intentions of the parties are, with respect to the meaning of the particular language used and would, therefore, be caught by any rule that precludes the admission of evidence of subjective intentions.) As intimated above, Burton's distinction between "prior course of dealing" as subjectivist and "practical construction" or subsequent "course of performance" as objectivist is difficult to sustain. In each case, the evidence relates to objective facts. Nonetheless, it is admitted to establish what the parties subjectively intended by the language they used in the agreement.

It is, therefore, of interest that Burton provides some appealing illustrations of the relevance of "course of performance." For example, in a case concerning the supply of crushed rock,³³ where the agreement was ambiguous as to which party was required to engage in the final act of crushing the rock to meet certain specifications, the parties had cheerfully supplied and accepted rock in a particular size without objection by the purchaser. The court held that the agreement should be interpreted in light of that course of performance to mean that the supplier was satisfactorily complying with its contractual obligations. In another case,³⁴ a tenant who paid the assessed taxes on leased land for seven years and had also taken proceedings to challenge both the taxes assessed and the valuation upon which they were based was unable to successfully argue that the proper interpretation of the lease was that the tenant was not required to pay such taxes. In my view, at least, such examples make an appealing case for the admission of such evidence. Burton also provides interesting illustrations of courts relying on the circumstances or commercial background of the agreement, the agreement's purpose(s), trade usages and customs, and statutes and judicial precedents. These less controversial elements need not be explored for present purposes.

In the final Chapter 6, "Objective Contextual Interpretation," Burton sets forth his own vision of the law of interpretation. In this

33. *Robson v. United Pacific Insurance Co.*, 391 S.W.2d 855 (Mo. 1965).

34. *Coliseum Towers Associates v. County of Nassau*, 769 N.Y.S.2d 293, 2 A.D.3d 562 (2003).

discussion, Burton reveals himself as someone with rather conservative views on the admissibility of elements for the performance of the three interpretive tasks. Indeed, he might be said to be something of a contrarian. He considers the prevailing American approach — which is to admit subjective elements in order to identify the terms of the contract and in order to resolve ambiguity — to be unsatisfactory. Moreover, it is his view that several academic luminaries in the field of contracts scholarship, whose views are aligned with this approach, are misguided. These are large targets. The late Arthur Corbin, with whom he disagrees, Mel Eisenberg and the late Allan Farnsworth are, in the view of many, myself included, the leading contract scholars of their respective generations. For Burton, however, they have failed to appreciate that a middle ground, “Objective Contextual Interpretation,” is preferable to the literalism which he claims is falsely attributed by such scholars to the late Samuel Williston on the one hand and subjectivism or, even worse, strong subjectivism, which these scholars favour, on the other hand.

Burton’s preferred view with respect to the elements admissible for the performance of the three tasks may be briefly stated: For task 1, he proposes a rather austere version of the parol evidence rule. To determine whether the parties intended a complete integration of their agreement, a court could examine merely the contract document and “intrinsic contextual elements,”³⁵ *i.e.*, the whole contractual document and the document’s evident purpose(s). Burton would not permit a court to examine the objective circumstances at the time of contracting, for example, or any other extrinsic evidence. On this view, the presence or absence of a merger clause obviously weighs very heavily. Burton suggests that, notwithstanding the presence of such a clause, a written document might indicate, on its face, that a true merger is not intended. Imagine, for example, that the document is marked “draft.”³⁶ As Burton concedes, his favoured approach runs against the American majority view which is to examine all relevant evidence in order to determine the presence of a shared subjective intent to integrate the agreement. Burton defends his harsh version of the rule principally on the basis of the objective of “security of transactions”³⁷ Commercial agreements, he asserts, are typically

35. *Ibid.*, at p. 196.

36. *Ibid.*, at p. 197.

37. *Ibid.*, at p. 199.

between large commercial entities and often involve foreign parties “whose legal traditions are strongly tied to the written agreement.”³⁸ Further, holding the parties to the appearance of the agreement as integrated is in the interest of third parties such as assignees, investors and others who might rely on the appearance of the written document. Burton has little sympathy for the party who may not have been aware of or understood the significance of a merger clause. Parties who do not intend an agreement to be integrated when it appears to be such ought to “speak up.”³⁹

When Burton turns to task 2, the question of ambiguity, he makes two central points. First, he is strongly of the view that there must be a finding of ambiguity before one turns to the task of resolving it. We will return to this point below. Second, determining whether or not the meaning of a particular provision is ambiguous involves a question of interpretation. In this respect it is unlike task 1, which does not involve interpretation in this sense. Accordingly, a broader range of materials is required for task 2 than those admissible when performing task 1. Burton’s preferred rule renders admissible what he characterizes as the objective context. In deciding whether or not a provision is ambiguous, a court could examine the whole document and its evident purpose(s), evidence concerning the objective circumstances at the time of formation, trade usages and any practical construction. Burton would exclude from consideration the three subjective elements, prior course of dealing, course of negotiations and party testimony concerning subjective intentions. In deciding whether or not a provision is ambiguous, then, Burton would have a court consider a broad range of extrinsic evidence, albeit evidence that he considers to be objective in nature. He flatly rejects any restriction of the finding of ambiguity to those patent ambiguities that are intrinsic to the document itself. A rule that restricts the inquiry to intrinsic ambiguities is essentially literalist in nature and fails for the reasons previously indicated.

Turning to the third task, Burton similarly proposes that the courts’ deliberations on the question of resolving the ambiguity that has been revealed in task 2 be restricted to consideration of the objective elements listed above. He rejects the prevailing view that once ambiguity is discovered, the court should be able to examine subjective elements for several reasons. His principal objection is

38. *Ibid.*

39. *Ibid.*, at p. 201.

that it is very difficult to establish subjective intent as a factual matter. In his view, parties ought to be able to settle disputes without lengthy investigations of such matters. If the cost of restricting the courts' deliberations to the objective context will occasionally lead to decisions which are inconsistent with the actual intentions of the parties, Burton asserts that this is simply the cost of having more easily administrable rules. Moreover, examination of subjective factors, in his view, is not foolproof and can lead to similar error for different reasons.

Only a brief sketch of Burton's arguments in support of objective contractual interpretation and possible replies to them can be attempted here. A principal concern for Burton, often alluded to in the text, relates to the role of juries in matters of contract interpretation. If the interpretation rules admit evidence of subjective intentions, a dispute concerning the nature of the parties' subjective intent will go to the fact finder. In America, that will often be a jury. Jury trials are pervasive in the United States, even in commercial matters. Burton believes that leaving such matters to a jury is unwise. Jury verdicts are "notoriously unpredictable,"⁴⁰ perhaps especially in the context of contractual interpretation. "Many contracts are long, complicated documents requiring great sophistication to parse them well."⁴¹ In Burton's view, "subjectivism probably confuses a jury unacceptably."⁴² Juries are likely to confuse the three tasks. Even law students have difficulty sorting them out.⁴³ If one restricts the inquiry to objective elements, however, tasks 2 and 3 can typically be performed by a judge as a matter of law. From afar, one can have a good deal of sympathy with Burton's aversion to jury verdicts in this context. Indeed, it may well be that a similar aversion underlies the more conservative strains of U.S. judicial thinking on interpretive issues. From a Canadian perspective, however, this point has little relevance. In common law Canada, juries have virtually no role to play in the context of commercial disputes.⁴⁴

Burton also supports his preferred approach on the basis that the factors relevant to task 2 ought to be the same as those relevant to task 3. This argument may be thought, however, to cut both

40. *Ibid.*, at p. 214.

41. *Ibid.*

42. *Ibid.*, at p. 203.

43. *Ibid.*

44. Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (Toronto, Ministry of the Attorney General, 1996).

ways. If, as in many jurisdictions, courts will consider evidence related to subjective intent in resolving ambiguities, this would be an argument for permitting a court to look at such evidence in order to decide whether or not the agreement is truly ambiguous. Indeed, once it becomes clear that Burton holds that the same elements should be admissible with respect to both task 2 and task 3, one may ask whether it is necessary to identify an ambiguity as a threshold question. Nothing turns on a finding of ambiguity in the sense that no additional evidence becomes available to the court. Burton argues vigorously, however, that the identifying of an ambiguity must be considered to be a threshold matter. Again, the underlying concern relates to the role of juries. If a judge finds, as a matter of law, that there exists no ambiguity, there is nothing to go to the jury and that, in Burton's view, is a desirable outcome. Again, this argument has little relevance to the Canadian scene.

Burton's rejection of subjectivist elements also rests on a theoretical objection to the position he ascribes to "strong" subjectivists. A strong subjectivist, for Burton, takes the view that the conventional meaning of language is simply irrelevant to the exercise of contractual interpretation. The only relevant meaning, in a strong subjectivist's view, is that attached by each party to the particular provision. A party who has an idiosyncratic meaning to the term can insist on that meaning only if the other party is or ought to have been aware that the first party had such an intention. In Burton's view, this is Humpty Dumpty's theory of meaning in *Through the Looking-Glass*.⁴⁵ A word means what I choose it to mean, nothing more nothing less. Strong subjectivists ignore the conventional use of language and, allegedly, would never enforce an agreement on the basis of a conventional or objective meaning that neither party subjectively intended. If there are indeed such people, I would agree with Burton that their views ought not be followed. English, Canadian and, no doubt, American courts enforce the objective or conventional meaning of language in contractual documents routinely. It is surely possible, however, to take the position, as many courts apparently do, that in the context of a dispute concerning the proper interpretation of an agreement, it may occasionally be

45. Lewis Carroll, *Through the Looking-Glass*, reprinted in *The Complete Works of Lewis Carroll* (New York, Modern Library, 1947), in Burton, *supra*, footnote 4, at p. 207.

relevant to examine the subjective understandings of the parties to the agreement.

Finally, Burton claims that his preferred approach has the virtue of being consistent with the objective theory of contract formation. Again, I find this point unconvincing. As he asserts,⁴⁶ the objective theory of contract formation holds that the offeree is entitled to rely on what appears to be an offer made by the offeror, whether or not the offeror intends it as such. Similarly, the offeror is entitled to rely on what appears to be a manifestation of acceptance by the offeree, whether or not acceptance is subjectively intended. As I understand the objective theory of contract formation, however, it is not designed to impose contracts on two parties, neither of whom intended to enter into an agreement. Rather, it is designed to protect the interest of an individual who reasonably relies on an objective manifestation of the other party's consent.

Moreover, the objective theory of contract formation does not hold that courts cannot entertain evidence of what the parties actually thought they were doing in making a determination of this kind. Indeed, it can be argued that the objective theory of contract formation is more consistent in these respects with a rule of contract interpretation that allows courts to look at what the parties thought that they were agreeing to in order to either give effect to those intentions, where they concur, or protecting the reasonable reliance of one party on the other's objective manifestation of agreement to the meaning of a particular term. Burton is offended by the notion that one party can be held to an interpretation which that party knew was intended by the other or, indeed, for some reason ought to have known was intended by the other party. Though I certainly would not classify myself as a strong subjectivist who believes that the conventional meaning of language is irrelevant to contract interpretation, I am much less offended by that proposition and, indeed, delighted that many courts take the view that in such a case it may be appropriate to hold one party to the other's understanding of what the agreement meant.

In sum, though I do have grave reservations about the relevance of Burton's ultimate thesis to the Canadian context and, indeed, as to its persuasiveness in a more general way, it is nonetheless the case that Burton's challenging analysis constitutes an enormously valuable contribution to our understanding of contractual

46. *Ibid.*, at p. 201.

interpretation issues. I, for one, will view the subject in the future through the lucid and illuminating analytical framework he has provided.

John D. McCamus*

* Professor, Osgoode Hall Law School, York University; Davies Ward Phillips & Vineberg LLP.